

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JUNE 12 2007

COURT OF APPEALS
DIVISION TWO

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| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2006-0439-PR |
| |) | DEPARTMENT B |
| v. |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| GARY EDWARD COX, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20043431

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Gary E. Cox

Buckeye
In Propria Persona

E S P I N O S A, Judge.

¶1 During a traffic stop, a sheriff's deputy discovered a shotgun and two loaded handguns in the trunk of a car being driven by petitioner Gary Edward Cox, a convicted felon and prohibited possessor. A jury subsequently found Cox guilty of three counts of weapons misconduct for possessing the guns. The trial court found he had six prior felony

convictions and sentenced him in 2005 to concurrent, substantially mitigated, six-year prison terms.

¶2 We recently affirmed the convictions and sentences on appeal, *State v. Cox*, 214 Ariz. 518, 155 P.3d 357 (App. 2007), after having stayed the appeal from December 2005 until July 2006 while the parties briefed and the trial court considered both a motion to vacate judgment filed in September 2005 pursuant to Rule 24.2, Ariz. R. Crim. P., 17 A.R.S., and a petition for post-conviction relief filed in January 2006 pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. The trial court consolidated the motion and petition for hearing purposes, held a two-day evidentiary hearing on both matters in May 2006, and denied both in an expository minute entry filed on July 24, 2006.

¶3 In the present petition for review, Cox asks us to review the denial of both his Rule 24.2 motion to vacate judgment and his petition for post-conviction relief. But the issues raised in the motion were appealable issues, and the trial court denied that motion in July, several months before Cox filed his opening brief on appeal in November. Consequently, any issues he raised or could have raised on appeal are now precluded, and we will not address them. *See* Ariz. R. Crim. P. 32.2(a). We address instead only those issues falling within Rule 32.1 that were properly raised below. We will not disturb the trial court's denial of relief unless it clearly abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶4 In his petition for post-conviction relief, Cox alleged trial counsel rendered ineffective assistance in three instances: (1) after stipulating that Cox was a prohibited possessor by virtue of a previous felony conviction, counsel did not object when the trial court failed to instruct the jury that it needed to find each element of the offense proven beyond a reasonable doubt; (2) counsel dissuaded Cox from testifying at trial by incorrectly advising him about his right to testify and by failing to file a motion in limine to exclude or limit the use of some of his prior convictions for impeachment if he testified; and (3) counsel failed to file a motion to suppress the weapons alleging lack of reasonable suspicion to stop Cox’s vehicle or to detain him, lack of either probable cause or consent to search the vehicle, and failure to inform Cox of his Fifth Amendment rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

¶5 To establish a claim of ineffective assistance of counsel, “a defendant must show that counsel’s performance fell below objectively reasonable standards and [that] the deficient performance prejudiced the defendant.” *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005); *see also Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984). After the evidentiary hearing it held in this case, the trial court found counsel had not been ineffective and Cox was not entitled to relief. With respect to Cox’s stipulation at trial that he was a convicted felon and prohibited possessor, the trial court rejected Cox’s claim that the court had erred in instructing the jury about the stipulation. The court wrote:

The defendant contends that the court erred in instructing the jurors about the written stipulation signed by the defendant and counsel. The stipulation provided in part that the defendant had been convicted of a felony offense and his right to bear a firearm had not been restored. By agreeing to these facts, the defendant effectively limited the introduction of any additional evidence about his prior record and kept the juror[s'] focus on his lack-of-knowledge defense. In return, he gave up little since the State was prepared to prove his prior convictions and the defendant had admitted being a convicted felon to Deputy Bonds. Under these circumstances, any error in the court instructing the jurors that they should accept the stipulation as proof that the defendant was a prohibited possessor (as opposed to telling the jurors that acceptance of the stipulation was within its discretion) was harmless. *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005).¹

¶6 Essentially, the trial court ruled that counsel's stipulating to Cox's prohibited-possessor status was a sound tactical decision. As long as a strategic decision "could have some reasoned basis," it will not support an ineffective assistance claim. *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). And we agree with the trial court that, for the reasons it stated, any resulting error was ultimately harmless. It follows, therefore, that

¹Our supreme court stated in *Carreon*:

The judge should not have instructed the jury that the stipulation satisfied the State's burden of proving an element of the crime. But in the absence of an objection at trial, such error does not justify reversal unless the error goes to the very foundation of Carreon's theory of the case. Here, Carreon stipulated to the fact that he was a prohibited possessor on January 23, 2001, and presented no argument to contradict that fact.

210 Ariz. 54, ¶ 47, 107 P.3d at 910.

Cox could not show any prejudice caused by counsel's failing to object to what the trial court told the jury about the stipulation. Even had Cox established that counsel's failure to object was a departure from the applicable standard of care, Cox's inability to show resulting prejudice is fatal to his claim. *See State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance."); *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant makes insufficient showing on either prong of *Strickland* test, court need not address the other).

¶7 The trial court similarly rejected Cox's claim of ineffectiveness based on counsel's recommendation that Cox not testify at trial. Although the court found merit to his contention that counsel should have sought a pretrial ruling to establish which of Cox's "numerous priors could be used to impeach [him]" to help Cox "make a more informed decision about the pros and cons of testifying," the court expressly found counsel's failure to have done so did not constitute deficient performance or establish ineffectiveness. Thus, the court wrote:

In the first place, the argument that this court would have precluded many or all of the defendant's convictions thereby rendering it safe for him to testify is speculative in nature. Multiple felony convictions say something about the credibility of an individual. Secondly, the advice to not testify was sound and professionally appropriate for other reasons. Among them were the risk that the defendant might not perform well as a witness and the likelihood that he would be successfully cross examined about his statement to Deputy Bonds in which he admitted transporting his girlfriend's guns.

In stipulating to the defendant's status as a prohibited possessor and by relying on witnesses other than the defendant, trial counsel had crafted a cogent defense. Though this defense was unsuccessful, the advice and conduct of trial counsel met and exceeded the minimum level of professionalism required by the Constitution.

¶8 Finally, the trial court ruled counsel had not been ineffective in failing to file a motion to suppress the weapons. Noting that the combined Rule 24.2 and Rule 32 evidentiary hearing had functioned as “a post-trial suppression hearing to address the defendant's Fourth Amendment claims,” the court found there had been reasonable suspicion justifying the stop of Cox's car; the length of Cox's resulting detention was reasonable under the circumstances; the deputy who had searched the trunk of Cox's car had probable cause to do so, making his discovery of the weapons lawful; and Cox had not been interrogated in violation of *Miranda*. Based on its conclusion that Cox's constitutional rights had not been violated, the trial court determined Cox could not show prejudice resulting from counsel's failure to file a suppression motion. *See also State v. Nirschel*, 155 Ariz. 206, 208-09, 745 P.2d 953, 955-56 (1987) (whether to move to suppress evidence is strategic decision; provided some reasoned basis existed for decision, counsel's election will not support ineffective assistance claim).

¶9 The trial court properly analyzed and correctly resolved the ineffective assistance claims presented in Cox's petition for post-conviction relief, and we find no abuse of its discretion in denying relief. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (appellate court need not elaborate on trial court's correct resolution of

clearly elucidated issues). Cox raises one new issue in the petition for review—his complaint that trial counsel failed to request a trial continuance so Cox could retain a different lawyer—but we do not address on review issues not first presented to the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). The remaining issues raised in the petition for review—the denial of Cox’s post-conviction discovery request for telephone records, his allegation that the arresting deputy had perjured himself at trial, the lawfulness of the stop of Cox’s car, and the trial court’s refusal to give certain jury instructions requested by the defense—all were issues raisable on appeal that are, therefore, precluded here. *See* Ariz. R. Crim. P. 32.2(a).

¶10 Although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge